IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

U.S. COMMODITY FUTURES TRADING COMMISSION, Plaintiff, v. KRAFT FOODS GROUP, INC. and MONDELĒZ GLOBAL LLC, Defendants.	)	Case No. 15 C 2881 Judge John Robert Blakey

MOTION FOR CONTEMPT, SANCTIONS, AND OTHER RELIEF

PUBLIC REDACTED VERSION

The statements of the CFTC and its Commissioners demonstrate that they never intended to comply with the agreement they negotiated, that they presented to the Court as having been approved by the CFTC *and* its Commissioners, and that the Court ultimately ordered. Instead, the CFTC and its Commissioners engaged in a deliberate, orchestrated effort to violate the Court's Consent Order within minutes of its entry. Defendants Kraft Foods Group Inc. and Mondelēz Global LLC (collectively "Defendants") therefore respectfully move this Court for an order (1) finding the CFTC and its Commissioners in contempt of court for violating the terms of the Consent Order agreed to by the parties and entered by the Court, Dkt. No. 310, and (2) ordering the CFTC and its Commissioners to take the remedial actions and pay the monetary sanctions requested at the end of this motion.

BACKGROUND

As the public record reflects, before the Court's entry of the Consent Order, the CFTC faced several pending motions that threatened to resolve the case in Defendants' favor or, at the very least, had the potential to substantially trim the relief the CFTC could seek at any trial.

On August 15, 2019, however, this Court entered a Consent Order memorializing the parties' agreement to settle the CFTC's claims against Defendants. Among other things, the Consent Order stated that "[n]either party shall make any public statement about this case other than to refer to the terms of this settlement agreement or public documents filed in this case." (Dkt. No. 310 at 3 ¶ 8.) [redacted] *See* Dkt. No. 303 at 5-6.

[redacted]

[1] [redacted]

[redacted]

On August 15, 2019, immediately after the Court entered the Consent Order and dismissed the case with prejudice, the CFTC published to its website a press release, boasting in the title, "Penalty Valued at Three Times the Alleged Gain."[2] The press release also provided a statement from Chairman Heath P. Tarbert in which he claimed the settlement remedied conduct

[2] As explained below, this statement is false.

that inflicted "real pain on farmers by denying them the fair value of their hard work and crops," and "hurt[] American families by raising the costs of putting food on the table."[3] Ex. 1. The CFTC's official press release also directed readers to two additional statements, also posted to the CFTC's website, effectively incorporating those additional statements by reference: one titled the "Statement of the Commission" and the other titled "Statement of Commissioners Berkovitz and Behnam." Ex. 1 (linking to Exs. 2 and 3). As discussed in the section below, all three statements clearly and intentionally violate Paragraph 8 of the Consent Order.

ARGUMENT

This Court has the inherent power to enforce its orders through civil contempt proceedings. *Shillitani* v. *United States*, 384 U.S. 364, (1966); *Jones* v. *Lincoln Elec. Co.*, 188 F.3d 709, 737 (7th Cir. 1999). To establish a defendant's liability for civil contempt, a party must show that (1) a valid court order existed; (2) a party had knowledge of the order; and (3) the party failed to comply with the order. *See, e.g.*, *Stotler & Co.* v. *Able*, 870 F.2d 1158, 1163 (7th Cir. 1989). To hold defendant in contempt, the Court need not find that defendant willfully violated the order; the court need only find that defendant has not been "reasonably diligent and energetic in attempting to accomplish what was ordered." *Goluba* v. *School Dist. of Ripon*, 45 F.3d 1035, 1037 (7th Cir.1995). If the court finds defendant in contempt of the original order, it may impose civil sanctions to compel compliance with the order and to compensate parties for harm suffered as a result of defendant's non-compliance. *United States* v. *United Mine Workers of America*, 330 U.S. 258, 303-04 (1947).

[3] The CFTC never alleged that Kraft deprived farmers of the fair value of their hard work and crops, nor that Kraft raised the cost of putting food on the table.

I. The CFTC and Its Commissioners Willfully Violated The Consent Order

There is ample evidence that the CFTC and its Commissioners violated the Consent Order, that their violations were willful, and that they never intended to comply with the bargain they struck to settle the case.

A. The CFTC's and Its Commissioners' Willful Violations Were Part of an Orchestrated Strategy to Violate the Consent Order

The Statement of Commissioners Berkovitz and Behnam makes clear that its very *purpose* is to circumvent Paragraph 8 of the Consent Order. The Commissioners initially claim that Paragraph 8 does not apply to them. Ex. 3 at 1 ("[Paragraph 8] does not impede our ability to provide information about this case to the public in light of each Commissioner's right to discuss this case freely."). Then they admit that the reason for their statement is to supply their version of supposed facts that improperly tout a supposed victory for the CFTC, commentary the CFTC agreed to forego as part of its agreement with Defendants. *Id.* (Commissioners stating "in settlements where there are no evidentiary findings, it is critical that a Commissioner be able to speak publicly about his or her reasons for determining that the law has been violated, why the agreed penalties are appropriate, and why the agency did not obtain findings of fact or proceed to trial"). To the extent there is any doubt as to whether the CFTC and its Commissioners intended their statements to comply with the Court's Order, the Statement of Commissioners Berkovitz and Behnam resolves that question: they did not.

Nor should the CFTC—or as it describes itself, the only "party" to the case and thus the only party bound by the agreement—be excused for the conduct of its individual Commissioners. *See* Ex. 2 at 1. As a government agency, the Commission can only act or speak through its Commissioners and its staff. The CFTC's argument would allow everyone at the CFTC capable of making a public statement to violate the Order with impunity. Moreover, even if only the

amorphous "CFTC" were bound by the Order, the "CFTC" violated Paragraph 8 when it endorsed the statements of its Commissioners by identifying them *in the CFTC's official press release*, linking to them, and posting them prominently on the CFTC's webpage announcing the settlement. It is obvious from the statements at issue that the CFTC, its Commissioners, and possibly certain of its enforcement lawyers and General Counsel, assisted with the drafting of all three statements while they waited for the Court to enter the Consent Order.[4] The CFTC released all of the statements simultaneously as part of a coordinated effort. [redacted]

These facts demonstrate a deliberate and orchestrated effort by the CFTC, its Commissioners, and possibly certain of its staff, to violate the Consent Order. They also demonstrate a total disregard for the authority of this Court. There will be no reason for future parties to agree to settlements if the Commissioners—the only parties with the power to bind the CFTC to an agreement in the first place—may simply disregard the agreement without consequence.

B. The CFTC Deliberately Misrepresented the Court's Role with Regard to the Limitations Set Forth in Paragraph 8

Perhaps to obscure its failure to comply with a term critical to the agreement, the CFTC misrepresents Paragraph 8 as being "included at the Court's request." Ex. 2. This statement not only violates Paragraph 8's prohibition on public statements "other than to refer to the terms" of

[4] The attempt at legal argument to vindicate Commissioners' right to violate the Consent Order, contained in both Exhibits 2 and 3, make it likely that the CFTC's lawyers played a role in all three statements.

the settlement; it is also blatantly false and inexplicable.[5] [redacted] The CFTC nevertheless attempted to pin responsibility for the restriction in Paragraph 8 (with which it did not comply anyway) on the Court.

C. All Three Statements the CFTC Published Violate the Consent Order in Whole or in Part

All three of the documents the CFTC published to its website are replete with self-aggrandizing, and often false, statements that violate Paragraph 8's prohibition on public statements, other than those that refer to the terms of the settlement or publicly filed documents. The offending statements include, but are not limited to:

- Commissioners Berkovitz and Behnam's statement that "[t]he $16 million penalty and injunctive relief that the Commission has obtained in this consent order is as much as the Commission could reasonably expect to obtain if it were to prevail at trial." Ex. 3 at 1.[6]
- Commissioners Berkovitz and Behnam's numerous statements that Defendants' agreement to pay a monetary penalty means the Court necessarily found the CFTC had established facts sufficient to prove its claims, such as:
  - "The fact that a U.S. district court, through a consent order, imposes a civil monetary penalty demonstrates that the Commission has provided sufficient evidence to find that the defendants violated the law." Ex. 3 at 2.
  - "Because the court can only impose civil monetary penalties in instances where the government has made a proper showing, it must be presumed that the Commission has provided sufficient evidence to find a violation—even where the order itself does not explicitly say so." Ex. 3 at 2.

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5 [redacted]

6 In addition to being barred by Paragraph 8, this statement is false. [redacted]

  - "As part of its review, the district court will necessarily establish that a factual basis exists for the proposed decree." Ex. 3 at 2.[7]

- Commissioners Berkovitz and Behnam's suggestion that Defendants "neither admitted nor denied the allegations," mischaracterizing the Consent Order which reflects Defendants' denial of all the CFTC's claims. Ex. 3 at 2.

- Commissioners Berkovitz and Behnam's statement that "[i]n this case, it is not only [Defendants'] $16 million payment that is doing the talking. The Commission is speaking loudly and clearly as well: those who manipulate or attempt to manipulate our commodity markets will be prosecuted and punished." Ex. 3 at 2.

- Commissioners Berkovitz and Behnam's statement that "the penalty and injunctive relief imposed reflect, in our view, the gravity of [Defendants'] conduct." Ex. 3 at 1.

- Commissioners Berkovitz and Behnam's statement that "[t]his action demonstrates the CFTC's resolve to aggressively prosecute and punish those who manipulate or attempt to manipulate our nation's commodity markets." Ex. 3 at 1.

- Commissioners Berkovitz and Behnam's statement that "we believe that [Defendants] manipulated the wheat market." Ex. 3 at 1.

- The CFTC's statement that "[t]he $16 million penalty is approximately three times defendants' alleged gain." Ex. 1 at 1; Ex. 2 at 1.[8]

- The CFTC's statement that the Consent Order represents "a successful resolution" to the case.

- The CFTC's statement that the Consent Order "advances our mission of fostering open, transparent, and competitive markets." Ex. 2 at 1.

- The CFTC's statement that it only agrees to limitations such as those in Paragraph 8 "where our statutory enforcement mission of preventing market manipulation is substantially advanced by the settlement terms." Ex. 2 at 1.

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[7] These statements violate Paragraph 8 and misrepresent the Consent Order, which plainly states that "[n]othing in this Order reflects an agreement or a legal determination that Defendants have or have not violated any provision of the CEA." Dkt. No. 310 at 3.

[8] Like the statement of Commissioners Berkovitz and Behnam, this statement is false. [redacted]

All of the foregoing statements violate the Consent Order because they are not limited to referring to the terms of the Consent Order or to publicly filed documents. The purpose of nearly every statement is to accomplish exactly what the CFTC specifically agreed not to do by consenting to Paragraph 8: insisting publicly that the settlement was favorable to the agency, while implying that the Court found evidence that Defendants had manipulated the market and that Defendants admitted as much. The Court made no such finding and Defendants made no such admission. [redacted] In one fell swoop, the CFTC eviscerated both of these provisions.

II. The Court Should Impose Civil Sanctions to Compel the CFTC and Its Commissioners to Comply with the Court's Consent Order.

Because the CFTC and its Commissioners have violated the Court's Order, the Court may impose civil sanctions to compel their compliance and to compensate Defendants for the harm suffered as a result of the CFTC's non-compliance. *See Mine Workers*, 330 U.S. at 303-04.

Defendants have already incurred significant reputational damage because of the CFTC's premeditated media strategy in violation of the Consent Order. As public companies, Defendants and their counsel have received dozens of press inquiries about the CFTC's statements. But because Defendants, unlike the CFTC, have abided by the terms of the Consent Order, the primary reporting on the case has reflected the CFTC's self-aggrandizing version of the settlement—exactly what the CFTC agreed it would not do. The Court need only to review the media coverage of the case to appreciate that the CFTC's and its Commissioners' violations of

the Consent Order have created the misleading (or outright false) impression of the settlement that Paragraph 8 prohibited. For example:

- "[W]e are left with a Commission declaring victory and a respondent paying a substantial penalty."[9]
- "Message from the CFTC: (1) We Won and (2) Don't Expect Similar Concessions in the Future."[10]
- "The Commission specifically noted that it 'considered carefully Paragraph 8 of Section I of the Consent Order, which was *included at the Court's request*."[11]
- "The Commission expressed pleasure in bringing the matter to 'a successful resolution' and touted the settlement amount as equaling 'nearly three times the unlawful profit the Commission alleged the Defendants obtained' (which is one way of calculating the maximum penalty allowed)."[12]
- "In the CFTC's announcement, Chairman Heath P. Tarbert said, "America is the breadbasket of the world; wheat markets are its heart. Market manipulation inflicts real pain on farmers by denying them the fair value of their hard work and crops. It also hurts American families by raising the costs of putting food on the table. Instances of market manipulation are precisely the kinds of cases the CFTC was founded to pursue," he added."[13]
- Reporting on the Commissioners' statement, "We support entering into the consent order with Kraft, despite the absence of findings of fact, because the penalty and injunctive relief imposed reflect, in our view, the gravity of Kraft's conduct."[14]

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[9] *Long Awaited CFTC v. Kraft Settlement Resolves Manipulation Allegations*, National Law Review, Aug. 15, 2019, available at https://www.natlawreview.com/article/long-awaited-cftc-v-kraft-settlement-resolves-manipulation-allegations.

[10] *Id.*

[11] *Id.* (emphasis original in article).

[12] *Id.* As discussed above, the CFTC's statement that the $16 million represented triple the alleged gain is (1) false, [redacted] and (2) a transparent effort to (falsely) imply that it achieved through settlement the same penalty it would have received if it prevailed on every claim at trial.

[13] *Kraft, Mondelēz To Pay $16M in CFTC Wheat Futures Case*, Law360, Aug. 15, 2019, *available at* https://www.law360.com/articles/1189061.

[14] *Feds Reap $16 million settlement with Kraft, Mondelēz But Sow Confusion*, Chicago Sun-Times, Aug. 15, 2019, *available at* https://chicago.suntimes.com/2019/8/15/20807794/feds-reap-16-million-settlement-with-kraft-mondelez-but-sow-confusion.

Accordingly, in order to compensate Defendants for the harm from the CFTC's non-compliance, and to compel the CFTC and its Commissioners to comply with the Consent Order its Commissioners approved (but apparently do not like), Defendants respectfully request that the Court enter an order:

Stating or Finding:

1. The CFTC and Commissioners Berkovitz and Behnam violated the Consent Order and are therefore in contempt of court;
2. [redacted]
3. [redacted]
4. [redacted]
5. [redacted]
6. [redacted]

And Ordering:

7. [redacted]
8. [redacted]
9. [redacted]

10. [redacted]

11. [redacted]

12. [redacted]

CONCLUSION

For the reasons discussed above, Defendants respectfully requests that the Court grant Defendants the foregoing relief as a result of the CFTC's and its Commissioners failure to comply with this Court's August 15, 2019 Consent Order.

Dated: August 16, 2019

Respectfully submitted,

KRAFT FOODS GROUP, INC. and
MONDELĒZ GLOBAL LLC

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Attorneys for Kraft Foods Group, Inc. and Mondelēz Global, LLC

Exhibit 1

RELEASE Number
7996-19

August 15, 2019

Kraft and Mondelēz Global to Pay $16 Million in Wheat Manipulation Case

Penalty Valued at Three Times the Alleged Gain

Washington, DC — The U.S. Commodity Futures Trading Commission today announced that it obtained a $16 million penalty and injunction pursuant to a federal court's entry of a consent order against defendants **Kraft Foods Group, Inc.** and **Mondelēz Global LLC.** The order, entered on August 14, 2019 by the Honorable Judge John Robert Blakey of the U.S. District Court for the Northern District of Illinois, resolves the CFTC's complaint alleging, among other things, manipulation of the wheat market.

The $16 million penalty is approximately three times defendants' alleged gain. The order also enjoins Kraft and Mondelēz from engaging in future violations of the manipulation, wash trade, and position limit provisions of the Commodity Exchange Act and CFTC regulations charged in the complaint.

"America is the breadbasket of the world; wheat markets are its heart. Market manipulation inflicts real pain on farmers by denying them the fair value of their hard work and crops," said Chairman Heath P. Tarbert. "It also hurts American families by raising the costs of putting food on the table. Instances of market manipulation are precisely the kinds of cases the CFTC was founded to pursue."

The CFTC complaint alleged that in response to high cash wheat prices in late summer 2011, Kraft and Mondelēz developed, approved, and executed a manipulative strategy to purchase and stand for delivery on more than 3,000 futures contracts (approximately $90 million) of Soft Red Winter (SRW) Wheat in the December 2011 expiration to send the market a false signal that the defendants had demand for — and would use — futures wheat to source the defendants' wheat supply requirements in their Toledo mill. (Release No. 7150-15) The complaint alleged that, in fact, Kraft and Mondelēz had no intention of sourcing wheat from the futures market, and the $90 million of wheat futures at issue far exceeded their actual sourcing needs. As alleged, Kraft's and Mondelēz's true goal was to narrow the price spread between the December 2011 and deferred-month wheat futures contracts, thereby causing the market to sell cash wheat to Kraft and Mondelēz at lower prices, while earning Kraft and Mondelēz a profit on their speculative futures positions. The complaint further alleged that Kraft's and Mondelēz's actions caused an artificial price that ultimately earned them more than $5 million in profits.

Since fiscal year 2017, the Division of Enforcement's prosecution of manipulation-related cases has increased by more than 40 percent relative to the total number of such cases brought during the preceding 6 fiscal years.

CFTC Division of Enforcement staff members primarily responsible for this case are Robert Howell, Joseph Patrick, Stephanie Reinhart, Neel Chopra, Susan Gradman, and Scott Williamson, as well as former staff members Michael Frisch, Jennifer Smiley, and Rosemary Hollinger. Division of Market Oversight staff members responsible for this case are David Amato, Gene Kunda, Christa Lachenmayr, and Jerry Lavin.

A statement from the Commission can be found here. A further concurring statement by Commissioners Berkovitz and Behnam can be found here.

-CFTC-

Exhibit 2

SPEECHES & TESTIMONY

Statement of the Commission

August 15, 2019

Today the U.S. District Court for the Northern District of Illinois entered a Consent Order approved by the Commission that settles the *CFTC v. Kraft* litigation. We are pleased to bring this matter to a successful resolution, which terminates more than four years of litigation. The Consent Order results in a $16 million civil monetary penalty—nearly three times the unlawful profit the Commission alleged the Defendants obtained—and a permanent injunction prohibiting the Defendants from engaging in future violations of several anti-manipulation provisions of the Commodity Exchange Act and Commission Regulations.

The Commission believes that the Consent Order advances our mission of fostering open, transparent, and competitive markets. In unanimously approving the settlement, our Commission considered carefully Paragraph 8 of Section I of the Consent Order, which was included at the Court's request:

> "Neither party shall make any public statement about this case other than to refer to the terms of this settlement agreement or public documents filed in this case, except any party may take any lawful posi in any legal proceedings, testimony or by court order."

Our decision to approve the Consent Order was based on the fact that while this provision (hereinafter, "Paragraph 8") limits what *the Commission* (*i.e.*, the "party" referenced in Paragraph 8) can say about the *Kraft* litigation, it does not restrict individual Commissioners when speaking in their personal capacities.[1] The text of Paragraph 8 could not be clearer: it binds the acts of a "party," namely the Commission as plaintiff, and Kraft Foods Group, Inc. and Mondelēz Global LLC as defendants. While other provisions—such as Section IV, Paragraph 10—do apply beyond the parties, specific language in the Consent Order makes it so.

We do not expect the Commission to agree to similar language in the future, except in limited situations where our statutory enforcement mission of preventing market manipulation is substantially advanced by the settlement terms and the public's right to know about Commission actions is not impaired.

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[1] To be sure, in binding the Commission, Paragraph 8 includes any member of our agency's staff when they act on our behalf or speak for the CFTC.

Exhibit 3

SPEECHES & TESTIMONY

Statement of Commissioners Dan M. Berkovitz and Rostin Behnam Regarding the Commission's Settlement with Kraft Foods Group, Inc. and Mondelēz Global LLC

August 15, 2019

We are voting for this settlement because we believe that Kraft Foods Group, Inc. (Kraft) manipulated the wheat market.[1] The $16 million penalty and injunctive relief that the Commission has obtained in this consent order is as much as the Commission could reasonably expect to obtain if it were to prevail at trial. This action demonstrates the CFTC's resolve to aggressively prosecute and punish those who manipulate or attempt to manipulate our nation's commodity markets.

The settlement agreement in this case has two unusual features that merit further explanation and comment. First, the consent order agreed to by the Commission does not contain factual findings or conclusions of law. Second, the order limits the Commission's statements in this matter to information already in the public record. As the Commission observes, however, the consent order only limits the statements of the Commission as a collective body.[2] Individual Commissioners, speaking in their own capacities, retain their right and ability to speak fully and truthfully about this matter.

Commissioners, as public officials, must be able to explain to Congress and the public the basis for the sanctions obtained, as well as the rationale for entering into a settlement agreement rather than pursuing litigation. Although we disagree with any provision restricting the five-member Commission's capacity to make public statements, this provision does not impede our ability to provide information about this case to the public in light of each Commissioner's right to discuss this case freely.[3]

The Commission typically requires factual findings and conclusions of law in consent orders. CFTC enforcement actions not only punish violations of the law and deter future misconduct by the party to the action, but also provide guidance to the public about the agency's interpretation of its laws, thereby deterring similar misconduct by others.[4] Explaining to the public the factual basis for imposing a penalty not only serves to deter similar conduct in the future, but also is essential to avoid chilling legitimate market activity. "General deterrence is an exercise in communication. That is, for a sanctions regime to deter, the potential wrongdoer must be able to apprehend what conduct might give rise to a particular level of pain, in the form of a sanction."[5]

Federal agencies often decide to settle enforcement matters without further litigation for pragmatic reasons, including the avoidance of the costs and risks associated with a trial.[6] The Commission, like other federal agencies, may determine that resolving a case without evidentiary findings is appropriate, where the Commission believes that the settlement agreement, viewed in its entirety under the circumstances, is in the public interest.[7] We support entering into the consent order with Kraft, despite the absence of findings of fact, because the penalty and injunctive relief imposed reflect, in our view, the gravity of Kraft's conduct.

However, particularly in settlements where there are no evidentiary findings, it is critical that a Commissioner be able to speak publicly about his or her reasons for determining that the law has been violated, why the agreed penalties are appropriate, and why the agency did not obtain findings of fact or proceed to trial. The public has a right to know whether federal agencies are obtaining appropriate remedies when the law is violated.[8]

More generally, CFTC Commissioners must be able to freely and openly express their views on public matters. Congress has recognized the importance of such unrestrained communications by providing Commissioners with a statutory right to publicly state their views on matters before the Commission. Section 2(a)(10)(C) of the Commodity Exchange Act ("CEA") states:

> Whenever the Commission issues for official publication any opinion, release, rule, order, interpretati
> other determination on a matter, the Commission shall provide that any dissenting, concurring, or sep
> opinion by any Commissioner on the matter be published in full along with the Commission opinion, rel
> rule, order, interpretation, or determination.[9]

The Commission cannot bargain this right away in settlement negotiations. The courts are obligated to recognize it when crafting consent orders.[10]

Other federal agencies expressly prohibit consent or settlement agreements that restrict the agency's ability to speak about settlements or the underlying action. For example, the Department of Justice has adopted a regulation that prohibits it from entering into settlement agreements or consent decrees that are subject to a confidentiality provision in any civil matter in which the Department is representing the interests of the United States or its agencies.[11] The Department of Justice regulation is based upon "the public's strong interest in knowing about the conduct of its Government."[12]

In our view, in future situations, the Commission should not accept any confidentiality provisions or restrictions on the Commission's ability to make public statements.

Even where a court does not make any evidentiary findings or conclusions of law, the fact that a U.S. district court, through a consent order, imposes a civil monetary penalty demonstrates that the Commission has provided sufficient evidence to find that the defendants violated the law. Section 6c(d)(1) of the Act provides courts with "jurisdiction to impose [a civil monetary penalty], on a proper showing, *on any person found in the action to have committed any violation* . . . ."[13] Because the court can only impose civil monetary penalties in instances where the government has made a "proper showing," it must be presumed that the Commission has provided sufficient evidence to find a violation—even where the order itself does not explicitly say so. "As part of its review, the district court will necessarily establish that a factual basis exists for the proposed decree."[14]

Judge Rakoff has put it more bluntly. In approving a settlement agreement where the defendant neither admitted nor denied the allegations, yet paid the penalty for the violation, Judge Rakoff cogently noted:

> No reasonable observer of these events could doubt that the company has effectively admitted the allegations of the complaint in the way that, for a company, is particularly appropriate: by letting its mo do the talking.[15]

In this case, it is not only Kraft's $16 million payment that is doing the talking. The Commission is speaking loudly and clearly as well: those who manipulate or attempt to manipulate our commodity markets will be prosecuted and punished.

We thank the Division of Enforcement staff for their diligent prosecution of this matter.

We support the Commission's action today.

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[1] The basic facts underlying the Commission's case against Kraft are presented in *CFTC v. Kraft Foods Grp., Inc.*, 153 F. Supp. 3d 996 (N.D. Ill. 2015).

[2] *See* Statement of the Commission (August 15, 2019), available at https://www.cftc.gov/PressRoom/SpeechesTestimony/commissionstatement081519

[3] *See id.*

[4] *See, e.g.*, *Reddy v. CFTC*, 191 F.3d 109, 123 (2d Cir. 1999) (holding CFTC enforcement should be "to further the [CEA]'s remedial policies and to deter others in the industry from committing similar violations"); *In re First Fin. Trading, Inc.*, CFTC No. 00-35, 2002 WL 1453795, at *2, *14, *20 (July 8, 2002) (stating that CFTC has "important and delicate government function of punishing illegal conduct" and that CFTC civil penalties should serve as both specific and general deterrents) (quoting *Miller v. CFTC*, 197 F.3d 1227, 1236 (9th Cir. 1999)); *cf. SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 306, 308 (S.D.N.Y. 2011) (noting that enforcement actions brought by the Securities and Exchange Commission ("SEC") serve the public interest and deter future misconduct).

[5] David M. Becker, *What More Can Be Done to Deter Violations of the Federal Securities Laws?*, 90 Tex. L. Rev. 1849, 1850 (2012) (citing Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. Crim. L. & Criminology 765, 785-86 (2010)). David Becker was General Counsel of the SEC from 2000-2002 and 2009-2011.

[6] *See, e.g.*, *SEC v. Citigroup Glob. Mkts. Inc.*, 752 F.3d 285, 295 (2d Cir. 2014) ("Even if the Commission's case against [defendants] is strong, proceeding to trial would still be costly. The S.E.C.'s resources are limited, and that is why it often uses consent decrees as a means of enforcement.").

[7] *See id*. (noting that the determination of whether a consent judgment best serves the public interest is one that "rests squarely" with the federal agency and merits "significant deference").

[8] *See, e.g.*, *EEOC v. Erection Co.*, 900 F.2d 168, 172 (9th Cir. 1990) (Reinhardt, J. concurring in part and dissenting in part).

[9] 7 U.S.C. § 2(a)(10)(C).

[10] Appellate courts have invalidated confidentiality provisions that abrogated statutory disclosure obligations, such as that provided by CEA Section 2(a)(10)(C). *See, e.g.*, *Ford v. City of Huntsville*, 242 F.3d 235, 241-42 (5th Cir. 2001) (vacating confidentiality order in settlement agreement between City of Huntsville and a private party). In *Ford*, the Fifth Circuit held that a federal district court judge has an obligation to consider a statute requiring disclosure of "public information" and demonstrate a "compelling reason" for entering an order that conflicts with that statute, before issuing a confidentiality order to a governmental entity. *Id*.; *see also Davis v. E. Baton Rouge Par. Sch. Bd.*, 78 F.3d 920, 931 (5th Cir. 1996) (district court abused its discretion in entering order closing school board meetings without considering confidentiality order's effect on Louisiana law); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 791 (3d Cir. 1994) ("[W]here a governmental entity is a party to litigation, no protective, sealing or other confidentiality order shall be entered without consideration of its effect on disclosure of government records to the public under state and federal freedom of information laws.") (citations and alterations omitted). "When a court orders confidentiality in a suit involving a governmental entity . . . there arises a troublesome conflict between the governmental entity's interest as a litigant and its public disclosure obligations." *Pansy*, 23 F.3d at 791.

[11] 28 C.F.R. § 50.23.

[12] 28 C.F.R. § 50.23(b) (noting also that policy "flows from the principle of openness in government"). The U.S. Equal Employment Opportunity Commission ("EEOC") goes even further, specifying that "the Commission must be free to respond fully to inquiries regarding the suit and resolution." U.S. Equal Employment Opportunity Comm'n, Regional Attorneys' Manual, Pt. 3.IV.A.2.e (Apr. 2005), available at https://www.eeoc.gov/eeoc/litigation/manual/.

[13] 7 U.S.C. § 13a-1(d)(1) (emphasis added). CEA Section 6c(b) provides courts with jurisdiction to impose a permanent injunction "upon a proper showing." 7 U.S.C. § 13a-1(b).

[14] *Citigroup*, 752 F.3d at 295.

[15] *Vitesse*, 771 F. Supp. 2d at 310.